No. 10-1491

# In the Supreme Court of the United States

ESTHER KIOBEL, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND, DR. BARINEM KIOBEL, ET AL., PETITIONERS

*v.*

ROYAL DUTCH PETROLEUM CO., ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS


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## QUESTIONS PRESENTED

1. Whether the issue of corporate liability under the Alien Tort Statute (ATS), 28 U.S.C. 1350, is a merits question or a question of subject-matter jurisdiction.

2. Whether a corporation can be held liable in a federal common law action brought under the ATS.

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**BRIEF FOR THE UNITED STATES**
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## INTEREST OF THE UNITED STATES

This case presents the question whether a corporation can be held liable in a federal common law action brought under the Alien Tort Statute (ATS), 28 U.S.C. 1350. The United States has an interest in the proper application of the ATS because such actions can have implications for the Nation's foreign and commercial relations and for the enforcement of international law.

## STATEMENT

1. Petitioners are former residents of the Ogoni region in Nigeria. Respondents are Dutch and British holding corporations that, through a Nigerian subsid-

iary, were engaged in oil exploration and production in the Ogoni region.[1] In 2002, petitioners filed a putative class action invoking the ATS. Petitioners alleged that respondents aided and abetted, or were otherwise complicit in, various human rights abuses by the Nigerian government, including torture, cruel, inhuman, and degrading treatment, arbitrary arrest and detention, crimes against humanity, property destruction, forced exile, extrajudicial killings, and violations of the rights to life, liberty, security, and association. Specifically, petitioners alleged that Nigerian military and police forces killed, raped, and detained Ogoni residents, and destroyed their property, and that respondents provided logistical and financial support in connection with those actions. See Pet. App. A21-A23, A169-A173.[2]

2. Respondents moved to dismiss, arguing, *inter alia*, that the operative complaint failed to state a violation of the law of nations with the specificity required by *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 731-734 (2004). Pet. App. B1-B3. The district court granted the motion in part and denied it in part. *Id.* at B1-B23. The court first held that "where a cause of action for violation of an international norm is viable under the ATS, claims for aiding and abetting that violation are viable as well." *Id.* at B12. Concluding that customary international law did not define with sufficient particularity petitioners' claims for aiding and abetting property destruction,

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[1] The Nigerian subsidiary was dismissed from the suit for lack of personal jurisdiction. Pet. App. A170.

[2] State Department reports document a history of violent repression of Ogoni residents by Nigerian security forces over the relevant time period. See 18 State Dep't Annual Hum. Rts. Rep. to Congress 214 (1993); 19 State Dep't Annual Hum. Rts. Rep. to Congress 190 (1994); 20 State Dep't Annual Hum. Rts. Rep. to Congress 197-198, 200 (1995).

forced exile, extrajudicial killing, or violation of the rights to life, liberty, security, and association, the court dismissed those claims. *Id.* at B13-B15, B20-B21. The court, however, declined to dismiss petitioners' claims of aiding and abetting arbitrary arrest and detention, crimes against humanity, and torture. *Id.* at B16-B20. Respondents did not raise and the court did not decide whether a corporation may be held liable in a suit under the ATS. The court certified its order for interlocutory appeal under 28 U.S.C. 1292(b). Pet. App. B21-B23.

3. The court of appeals granted both parties' petitions for interlocutory appeal, and affirmed in part and reversed in part.

a. Petitioners argued that the district court erred in dismissing their extrajudicial-killing claim; respondents argued that the court erred in not dismissing the operative complaint in its entirety. See Br. in Opp. App. 33a-34a, 38a n.6. Respondents' primary contentions were that "[n]o definite and uniformly agreed-upon norm of the law of nations" (*id.* at 49a) prohibited any of respondents' alleged acts, and that respondents could not be held liable for the acts of their corporate subsidiary. With respect to torture and extrajudicial killing, respondents also asserted that the claims were displaced by the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73, and that respondents were not state actors. See Br. in Opp. App. 55a-57a, 60a-65a, 70a, 71a-72a. Finally, in arguing that they could not be held liable for the acts of their corporate subsidiary, respondents briefly asserted that the practices of international criminal tribunals "suggest[] that the law of nations does not attach civil liability to corporations under any circumstance." *Id.* at 59a-60a; see *id.* at 138a n.31 (petition-

ers' response on corporate liability); see also *id.* at 167a n.1, 169a.

b. The panel majority did not address any of the grounds relied on by the district court and fully briefed by the parties. Instead, the court chose to decide one of several "unresolved issues lurking in [its] ATS jurisprudence"—whether "the jurisdiction granted by the ATS extend[s] to civil actions brought against corporations under the law of nations." Pet. App. A7. The court noted that it had "decided ATS cases involving corporations without addressing the issue of corporate liability," but concluded that it was not bound by those decisions because the issue was one of subject-matter jurisdiction. *Id.* at A24-A25.

The court's analysis "proceed[ed] in two steps." Pet. App. A25. The court first considered "which body of law governs the question" and concluded that "international law"—specifically, those "norms that are 'specific, universal, and obligatory'"—controls. *Id.* at A16, A25-A39. The court explained that the ATS "leaves the question of the nature and scope of liability—who is liable for what—to customary international law," *id.* at A18, and that the "domestic law of the United States," or of "any other country," is "entirely irrelevant," *id.* at A9 & n.11. The court looked "to international law to determine whether corporate liability for a 'violation of the law of nations' is a norm 'accepted by the civilized world and defined with a specificity' sufficient to provide a basis for jurisdiction under the ATS." *Id.* at A38 (citations omitted).

Relying primarily on its assessment that "no corporation has ever been subject to *any* form of liability under the customary international law of human rights," Pet. App. A16, the court of appeals concluded that "cor-

porate liability has not attained a discernable, much less universal, acceptance among nations of the world in their relations *inter se*," *id.* at A79-A80. Because petitioners' claims were all asserted against corporations, the court ordered dismissal of the complaint "for lack of subject matter jurisdiction." *Id.* at A81.

c. Judge Leval concurred only in the judgment. Pet. App. A82-A186. He agreed "that the place to look for answers whether any set of facts constitutes a violation of international law is to international law," *id.* at A137, but concluded that international law "leaves the manner of enforcement * * * almost entirely to individual nations," *id.* at A87. Judge Leval nevertheless agreed that "*this* Complaint must be dismissed," because petitioners had not sufficiently alleged, as required by circuit precedent, that respondents aided and abetted customary international-law violations "*with a purpose* to bring about the Nigerian government's alleged violations." *Id.* at A90-A91; see *id.* at A168 (citing *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009), cert. denied, 131 S. Ct. 79 and 131 S. Ct. 122 (2010) (*Talisman*)).

4. The court of appeals denied panel rehearing. Pet. App. D3-D10, D24-D25 (Jacobs and Cabranes, JJ., each concurring in denial); *id.* at D11-D23 (Leval, J., dissenting). Rehearing en banc was denied by an equally divided court. See *id.* at C3-C5 (Lynch and Katzmann, JJ., each dissenting from denial).

## SUMMARY OF THE ARGUMENT

I. The court of appeals erred in characterizing the question whether a corporation can be held liable in a federal common law action based on the ATS as one of subject-matter jurisdiction. "[I]t is well settled that the

failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell* v. *Hood*, 327 U.S. 678, 682 (1946). When an alien plaintiff alleges a nonfrivolous claim of a tort in violation of the law of nations—as petitioners did here—a district court has subject-matter jurisdiction under the ATS.

The court of appeals nonetheless had jurisdiction under 28 U.S.C. 1292(b) to decide the issue of corporate liability here. Although that issue was neither raised in nor decided by the district court, it can be regarded as fairly included within the court's certified order. As a prudential matter, the court should not have decided that issue on appeal. But because this Court has already granted certiorari and the issue of corporate liability will now be fully briefed, it would be appropriate for the Court to decide that question rather than vacate and remand.

II. The merits question before this Court is narrow: whether a corporation can be held liable in a federal common law action based on the ATS. Although there are a number of other issues in the background of this case (*e.g.*, aiding-and-abetting liability, extraterritoriality, etc.), those issues were not decided by the court of appeals here. This Court therefore should address only the corporate-liability issue. On that issue, the court of appeals' holding is categorical and applies to all suits under the ATS, regardless of the theory of liability, the locus of the acts, the involvement of a foreign sovereign, or the character of the international-law norm at issue.

A. A corporation's liability in a suit under the ATS does not depend on the existence of a generally accepted and well-defined international law norm of corporate liability for law-of-nations violations. The particular

limitation this Court found dispositive in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004)—that any claim under the ATS must at least "rest on a norm of international character accepted by the civilized world and defined with" sufficient "specificity," *id.* at 725—pertains to the international-law norm itself and not to whether (or how) that norm should be enforced in a suit under the ATS. The latter question is a matter to be determined by federal courts cautiously exercising their "residual common law discretion." *Id.* at 738. International law informs, but does not control, the exercise of that discretion.

At the present time, the United States is not aware of any international-law norm of the sort identified in *Sosa* that distinguishes between natural and juridical persons. Corporations (or agents acting on their behalf) can violate those norms just as natural persons can. Whether corporations should be held accountable for those violations in private tort suits under the ATS is a question of federal common law.

B. Courts may recognize corporate liability in actions under the ATS as a matter of federal common law. The text and history of the ATS itself provide no basis for distinguishing between natural and juridical persons. Corporations have been subject to suit for centuries, and the concept of corporate liability is a well-settled part of our "legal culture." Pet. App. A8. *Sosa*'s cautionary admonitions provide no reason to depart from the common law on this issue.

International law does not counsel otherwise. Although no international tribunal has been created for the purpose of holding corporations civilly liable for violations of international law, the same is true for natural persons. And while international *criminal* tribunals

have, thus far, been limited to the prosecution of natural persons, that appears to be because of matters unique to criminal punishment. Notably, several countries that have incorporated international criminal offenses into their domestic law apply those offenses to corporations.

## ARGUMENT

### I. THE ISSUE OF CORPORATE LIABILITY IN A FEDERAL COMMON LAW ACTION BASED ON THE ALIEN TORT STATUTE DOES NOT IMPLICATE THE DISTRICT COURT'S SUBJECT-MATTER JURISDICTION

The court of appeals accepted the parties' interlocutory appeal under 28 U.S.C. 1292(b), and ordered dismissal of petitioners' suit based on a legal theory (*i.e.*, that a corporation cannot be held liable in a common law action under the ATS) that was neither raised in nor decided by the district court. In justifying its decision to do so, the court of appeals characterized the issue as one of subject-matter jurisdiction. Pet. App. A24-A25, A81. That was error, and the court should not have addressed the corporate-liability question for the first time on interlocutory appeal. Nonetheless, the appellate court had jurisdiction to decide the question of corporate liability and, in the current procedural posture, it would be appropriate for this Court to decide it as well.

A. "Subject-matter jurisdiction * * * refers to a tribunal's power to hear a case." *Morrison* v. *National Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (internal quotation marks and citations omitted). The question of subject-matter jurisdiction is "quite separate from the question whether the allegations the plaintiff makes entitle him to relief." *Ibid.* "[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for

want of jurisdiction." *Bell* v. *Hood*, 327 U.S. 678, 682 (1946). Unless the claim is so "plainly unsubstantial" that it falls outside the statutory grant of jurisdiction, failure to state a claim does not affect the court's power to hear a case. *Ex parte Poresky*, 290 U.S. 30, 32 (1933).

The ATS grants district courts "original jurisdiction" over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. 1350. A district court would lack ATS jurisdiction over a claim brought by a U.S. citizen, or a claim that could not colorably constitute a cognizable tort, or that was premised on an asserted law-of-nations violation that was plainly insubstantial. But so long as an alien plaintiff alleges a nonfrivolous claim of a tort in violation of the law of nations, the district court has subject-matter jurisdiction under the ATS. See *Sarei* v. *Rio Tinto, PLC*, 487 F.3d 1193, 1201 (9th Cir. 2007), opinion withdrawn and superseded on reh'g en banc, 550 F.3d 822 (2008) (not addressing jurisdictional issue); cf. *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 40 (D.C. Cir. 2011) (declining to decide whether pre-*Sosa* circuit law settles jurisdictional question). But see *Romero* v. *Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (treating corporate liability as jurisdictional under ATS).

The argument that a corporation may be subject to suit under the ATS is, at the very least, nonfrivolous. A district court therefore does not lack jurisdiction over an alien's otherwise colorable tort claim alleging a law-of-nations violation simply because the defendant is a corporation.

B. Although the court of appeals erred in reaching the corporate-liability issue on the premise that it went to the district court's subject-matter jurisdiction, it

nonetheless appears that the court of appeals had jurisdiction to decide that issue in this case.[3] A district court may certify for interlocutory appeal an "order involv[ing] a controlling question of law as to which there is substantial ground for difference of opinion," if "immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. 1292(b). Although the court of appeals "may not reach beyond the certified order to address other orders made in the case," it "may address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court.'" *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 205 (1996) (citation omitted); see *United States* v. *Stanley*, 483 U.S. 669, 677 (1987).

Here, the district court certified its order granting in part and denying in part respondents' motion to dismiss. Although the order did not address the issue of corporate liability (and respondents did not raise that issue), the denial of the motion to dismiss with respect to certain claims (crimes against humanity, torture, and arbitrary arrest and detention) could be understood as implicitly assuming that at least some law-of-nations violations are actionable against a corporate defendant in a suit under the ATS. Because the issue of corporate liability was to this extent "fairly included" within the certified order, the court of appeals had jurisdiction to decide it. See *Castellanos-Contreras* v. *Decatur Hotels, LLC*, 622 F.3d 393, 398-399 (5th Cir. 2010) (en banc) (finding jurisdiction under Section 1292(b) to review

[3] Petitioners argued to the contrary at the petition stage, Pet. 16 n.7; Reply Br. 5-6, but they do not renew that argument in their merits brief.

"threshold question" not expressly decided by district court, but implicit in its order and "material" to the order's validity). Permitting a court of appeals to consider, in appropriate circumstances, a legal infirmity fairly included within the certified order, but unnoticed or unaddressed by the district court, could "materially advance the ultimate termination of the litigation," 28 U.S.C. 1292(b).

C. To be sure, a court of appeals generally should not consider a question not raised in or addressed by the district court in the context of a Section 1292(b) interlocutory appeal. But that is ultimately a matter of prudence, not jurisdiction. As a prudential matter, the court of appeals should have declined to decide whether a corporation can be held liable in a suit under the ATS. The Second Circuit had stayed its hand on that issue in several previous cases. See Pet. App. A7 n.10, A24-A25 (citing cases); cf. *Aziz* v. *Alcolac, Inc.*, 658 F.3d 388, 394 n.6 (4th Cir. 2011) (declining to consider corporate-liability question on appeal from final judgment when not raised in district court). And it is not evident that the panel in this case would have reached out to decide the issue if the court had appreciated that the issue did not go to the district court's subject-matter jurisdiction. At the very least, the panel should not have done so without full briefing from the parties in this case. See pp. 3-4, *supra*.[4]

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[4] The corporate-liability issue was raised in *Talisman*, *supra*, which was argued in the Second Circuit in tandem with this case, Br. in Opp. 7 n.4. That issue was the subject of considerable discussion in the oral argument in this case, and was addressed in a post-argument letter brief submitted in *Talisman* by petitioners' counsel (who represented the plaintiffs in both cases), Br. in Opp. App. 190a-206a.

Although the court of appeals erred in characterizing the issue of corporate liability as one of subject-matter jurisdiction under the ATS, and in addressing it in the first instance and without full briefing by the parties, those errors do not pose any practical obstacle to this Court's review of the court of appeals' extensive substantive analysis. Because the Court has granted certiorari and the issue will now be fully briefed by the parties, it would be appropriate to decide the corporate-liability issue rather than vacate and remand to the court of appeals. See *Morrison*, 130 S. Ct. at 2877 (declining to remand); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 359, 381-384 (1959).[5]

## II. A CORPORATION CAN BE HELD LIABLE IN A FEDERAL COMMON LAW SUIT BASED ON THE ALIEN TORT STATUTE FOR VIOLATING THE LAW OF NATIONS

The second question presented is whether a corporation can be held liable in a suit under the ATS for violating the law of nations. As the court of appeals recognized (Pet. App. A7), a number of other questions, unanswered by this Court, are implicated by this case and other ATS cases. These include: whether or when

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[5] This Court may have granted certiorari in part to resolve a disagreement among the courts of appeals on the issue of corporate liability in suits based on the ATS. If the decision below were vacated, however, the present conflict would no longer exist. The Seventh, Ninth, Eleventh, and D.C. Circuits have all held that corporations can be liable in tort for a violation of the law of nations under the ATS. *Doe*, 654 F.3d at 39-57; *Flomo* v. *Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017-1021 (7th Cir. 2011); *Sarei* v. *Rio Tinto, PLC*, No. 02-56256, 2011 WL 5041927, at *6-*7, *19-*20, *24-*25 (9th Cir. Oct. 25, 2011), petition for cert. pending, No. 11-649 (filed Nov. 23, 2011); *Drummond Co.*, 552 F.3d at 1315-1316.

a cause of action should be recognized for theories of secondary liability such as aiding and abetting, see *Aziz*, 658 F.3d at 395-401 (citing cases); whether or when a cause of action should be recognized under U.S. common law based on acts occurring in a foreign country, see *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727-728 (2004); and whether or when congressional legislation such as the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73, should be taken into account in determining the scope and content of common law claims to be recognized under the ATS, cf. *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 23-37 (1990). Those questions are important, but they were not decided by the court of appeals in this case and should not be answered by this Court here.[6] And the holding on the

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[6] The court of appeals did not decide any of those issues in this case. See Pet. App. A7-A8 & n.10 (declining to address extraterritoriality); Br. in Opp. 30-35, 31 n.22 (suggesting respondents would raise alternative grounds for affirmance). Although Judge Leval concurred in the judgment because he believed the operative complaint should be dismissed for failure to sufficiently plead aiding-and-abetting liability under Second Circuit precedent (Pet. App. A168-A185), the majority did not decide that question. Aiding-and-abetting liability was, however, addressed by the Second Circuit in the *Talisman* case, which was heard in tandem with this case (see note 4, *supra*). The United States filed a brief in *Talisman* addressing both extraterritoriality and aiding-and-abetting liability, and stating that its arguments were "equally applicable to the *Kiobel* district court's determination that claims for aiding and abetting liability are available under the ATS." U.S. Br. at 5 n.1, *Talisman*, *supra* (No. 07-0016).

Respondents filed a conditional cross-petition for certiorari presenting the question whether the TVPA has "displaced" certain claims brought under the ATS (namely, torture, cruel, inhuman, and degrading treatment, and extrajudicial killing), but this Court denied that petition. See *Shell Petroleum N.V.* v. *Kiobel*, cert. denied, 132 S. Ct. 248 (2011) (No. 11-63). To the extent the Court wishes to address any of

issue the court of appeals did decide—that a corporation may not be held liable—is categorical and applies to all suits under the ATS, regardless of the theory of liability, the locus of the acts, the involvement of a foreign sovereign, or the character of the international-law norm at issue.

To isolate the consideration of the court of appeals' holding from those other issues, and to tie the corporate-liability issue to the origins of the ATS, consider (for example) a civil suit brought by a foreign ambassador against a U.S. corporation for wrongs committed against the ambassador by the corporation's employees in the United States. Cf. *Sosa*, 542 U.S. at 716-717 (discussing assault on foreign ambassador to the United States in *Respublica* v. *De Longchamps*, 1 U.S. (1 Dall.) 111 (Pa. Oyer & Terminer 1784)).[7] Or consider a suit against a corporation based on piracy committed by the corporation's employees. Cf. *id.* at 720, 724. Whether a federal court should recognize a cause of action in such circumstances is a question of federal common law that, while informed by international law, is not controlled by it.

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those questions, it should do so in a case where the issues have been decided by the court of appeals—and only after full briefing. The United States accordingly will address here only the corporate-liability question presented in this case.

[7] Cf. 1 Op. Att'y Gen. 71, 73 (1797) (opining on prosecution of newspaper editor for libel of Spanish Ambassador and noting that "[a]n affront to an ambassador is just cause for national displeasure, and, if offered by an individual citizen, satisfaction is demandable of his nation").

### A. Whether A Corporation May Be Held Liable In A Suit Based On The ATS Should Be Determined As A Matter Of Federal Common Law

1. This Court explained in *Sosa* that, although the ATS "is in terms only jurisdictional," and does not create a statutory cause of action, "at the time of enactment" it "enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." 542 U.S. at 712. At that time, the category encompassed "three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 724; see *id.* at 715, 720. Although the Court concluded that the door had not been closed "to further independent judicial recognition of actionable international norms" dictated by "the present-day law of nations," *id.* at 725, 729, it identified certain cautionary factors to be considered in deciding whether to recognize such a claim under federal common law, *id.* at 725-728. The Court made clear, however, that "[w]hatever the ultimate criteria for accepting a cause of action subject to jurisdiction under [Section] 1350," one essential criterion is that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than [those] historical paradigms." *Id.* at 732.[8] Accordingly, "any claim based on the present-day law of nations" must at least "rest on a norm of international character

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[8] See *Sosa*, 542 U.S. at 733 n.21 ("This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law."); *id.* at 738 n.30 (noting that the "demanding standard of definition" must first be met "to raise even the possibility of a private cause of action").

accepted by the civilized world and defined with a specificity comparable to the features of th[ose] 18th-century paradigms." *Id.* at 725.

2. Contrary to the court of appeals' conclusion, in determining whether a federal common law cause of action should be fashioned, courts are not required to determine whether "corporate liability for a 'violation of the law of nations' is a norm 'accepted by the civilized world and defined with a specificity' sufficient to provide a basis for jurisdiction under the ATS." Pet. App. A38 (citation omitted). In so holding, the court of appeals confused the threshold limitation identified in *Sosa* (which does require violation of an accepted and sufficiently defined substantive international-law norm) with the question of how to enforce that norm in domestic law (which does not require an accepted and sufficiently defined practice of international law). That confusion stems in large part from the court's misreading of footnote 20 in the *Sosa* opinion.

In footnote 20, the Court explained that "[a] related consideration"—*i.e.*, a consideration related to "the determination whether a norm is sufficiently definite to support a cause of action"—"is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 & n.20. The Court then proceeded to compare two cases exemplifying that "consideration." The first was Judge Edwards' concurring opinion in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 791-795 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985), in which he found (in this Court's words) an "insufficient consensus in 1984 that torture by private actors violates international law." *Sosa*, 542 U.S. at 732

n.20. The second was *Kadic* v. *Karadžić*, 70 F.3d 232, 239-241 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996), in which the court found (again, in this Court's words) a "sufficient consensus in 1995 that genocide by private actors violates international law." *Sosa*, 542 U.S. at 732 n.20. In a concurring opinion, Justice Breyer summarized footnote 20 as requiring that "[t]he norm * * * extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue." *Id.* at 760.

From *Sosa*'s footnote 20, it is clear that "*if* the defendant is a private actor," *Sosa*, 542 U.S. at 732 n.20 (emphasis added), a court must consider whether private actors are capable of violating the international-law norm at issue. The distinction between norms that apply only to state actors and norms that also apply to non-state actors is well established in customary international law. Pet. App. A143 (explaining that "the distinction between conduct that does and conduct that does not violate the law of nations can turn on whether the conduct is done by or on behalf of a State or by a private actor independently of a State").[9] For example, the Torture Convention defines "torture" as certain conduct done "by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 4 (1988), 1465 U.N.T.S. 85, 113-114 (Torture Convention). In contrast, genocide and war crimes do not require state involvement. See, *e.g.*,

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[9] Although the formal distinction in international law is between norms that require state action and norms that do not, this brief adheres to the Court's terminology in *Sosa* and refers to "state actors" and "non-state actors" to describe that distinction.

Convention on the Prevention and Punishment of the Crime of Genocide, art. II, *adopted* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (Genocide Convention); Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 136 (Common Article 3). Because certain international-law obligations *do* distinguish between state actors and non-state actors, to identify an accepted international-law norm with definite content for *Sosa* purposes, a court must conduct a norm-by-norm assessment to determine whether the actor being sued is within the scope of the identified norm.

The court of appeals, however, read *Sosa*'s footnote 20 more broadly in two respects. First, it misread the distinction between state actors and non-state actors—a distinction well recognized in international law—as a basis for drawing a distinction between natural and juridical persons—one that finds no basis in the relevant norms of international law. In fact, the footnote groups all private actors together, referring to "a private actor such as a corporation *or* individual." *Sosa*, 542 U.S. at 732 n.20 (emphasis added). And, notably, the defendant in *Kadic* was a natural person, 70 F.3d at 236, whereas the defendants in *Tel-Oren* were not, 726 F.2d at 775.

Second, the court of appeals misread footnote 20 to require not just an international consensus regarding the content of an international-law norm, but also an international consensus on how to enforce a violation of that norm. That reading reflects a misunderstanding of international law which establishes the substantive standards of conduct and generally leaves the means of enforcing those substantive standards to each state. See Louis Henkin, *Foreign Affairs and the United States Constitution* 245 (2d ed. 1996) ("International law itself

* * * does not require any particular reaction to violations of law."); Pet. App. A87 (Leval, J., concurring only in the judgment) ("[I]nternational law says little or nothing about how those norms should be enforced. It leaves the manner of enforcement * * * almost entirely to individual nations."); *Flomo* v. *Firestone Natural Rubber Co.*, 643 F.3d 1013, 1020 (7th Cir. 2011) (same); *Doe*, 654 F.3d at 41-42 (same). Once it is established that the international norm applies to conduct by an actor, it is largely up to each state to determine for itself whether and how that norm should be enforced in its domestic law.

That is not to say that international law is irrelevant to all questions of enforcement.[10] And, as discussed in Part II.B.3, *infra*, international law informs the court's exercise of its federal common law authority in determining whether to recognize a cause of action to remedy a violation of an international-law norm that otherwise meets the *Sosa* threshold—and in deciding what the contours of that cause of action should be. But that is a different task from satisfying *Sosa*'s threshold requirement of demonstrating the existence of an accepted and well-defined *substantive* international law norm. Cf. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964) ("Although it is, of course, true that United States courts apply international law as part of our own

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[10] There are, for example, internationally accepted rules on jurisdiction and immunities and, in certain contexts, international law may require certain minimum procedural standards. See, *e.g.*, 1 Restatement (Third) of Foreign Relations Law §§ 421, 423 (1986) (international law on jurisdiction to adjudicate); *id.* §§ 451-456 (international law on foreign sovereign immunity); *Arrest Warrant of 11 April 2000, Dem. Rep. Congo* v. *Belgium*, 2002 I.C.J. 3, 20-21 (Feb. 14) (head-of-state immunity).

in appropriate circumstances, the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders.").

To satisfy *Sosa*, a plaintiff in an ATS suit must allege conduct that violates a substantive norm of international law accepted by civilized nations and defined with the requisite degree of specificity. To the extent that substantive norm is defined in part by the identity of the perpetrator, then the defendant must fall within that definition. Similarly, if the substantive norm is defined in part by the identity of the victim or the locus of events, then conduct committed against a different victim or in a different locale could not violate that norm and a suit under the ATS could not stand. See *Sarei* v. *Rio Tinto, PLC*, No. 02-56256, 2011 WL 5041927, at *43 (9th Cir. Oct. 25, 2011) (McKeown, J., concurring in part and dissenting in part) ("[T]he handful of international law violations that may give rise to an ATS claim are often restricted by the identity of the perpetrator, the identity of the victim, or the locus of events."), petition for cert. pending, No. 11-649 (filed Nov. 23, 2011).

3. At the present time, the United States is not aware of any international-law norm, accepted by civilized nations and defined with the degree of specificity required by *Sosa*, that requires, or necessarily contemplates, a distinction between natural and juridical actors. See, *e.g.*, Torture Convention art. 1 (defining "torture" to include "*any act* by which severe pain or suffering * * * is intentionally inflicted on a person" for certain reasons, "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity") (emphasis added); Genocide Convention art. 2 (defining genocide to include "any

of the following acts" committed with intent to destroy a group, without regard to the identity of the perpetrator); Common Article 3 (prohibiting "the following acts," without regard to the identity of the perpetrator). Both natural persons and corporations can violate international-law norms that require state action. And both natural persons and corporations can violate international-law norms that do not require state action. The court of appeals examined the question of corporate liability in the abstract, and therefore did not address whether any of the particular international-law norms identified by petitioners (or recognized by the district court as satisfying *Sosa*'s "demanding" standard, 542 U.S. at 738 n.30) exclude corporations from their scope. Because corporations (or agents acting on their behalf) can violate the types of international-law norms identified in *Sosa* to the same extent as natural persons, the question becomes whether or how corporations should be held accountable as a matter of federal common law for violations that are otherwise actionable in private tort suits for damages under the ATS.[11]

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[11] This is plainly true when the theory of corporate liability is premised on respondeat superior and the responsible agent is a natural person. As the D.C. Circuit explained, in those circumstances agency law simply determines who will be held financially responsible for the injury inflicted by the agent. See *Doe*, 654 F.3d at 41, 51. But it is also true for a theory of direct corporate liability, because corporations are themselves capable of violating norms of customary international law of the sort described in *Sosa*—or at least the United States may permissibly recognize them to be capable of doing so. Although petitioners have not yet identified the precise theory of corporate liability on which they intend to proceed, the court of appeals erroneously rejected the concept of corporate liability in a suit under the ATS as a categorical matter. Cf. Pet. App. A77 n.51 (noting different standards of corporate liability). To the extent different theories of corporate

### B. Courts May Recognize Corporate Liability As A Matter Of Federal Common Law In Actions Under The ATS

This Court has instructed courts to act as "vigilant doorkeep[ers]," *Sosa*, 542 U.S. at 729, and to exercise "great caution" before "adapting the law of nations to private rights," *id.* at 728. Such restraint, however, does not justify a categorical exclusion of corporations from civil liability under the ATS.

1. The text of the ATS does not support the court of appeals' categorical bar. To the contrary, whereas the ATS clearly limits the class of plaintiffs to aliens, 28 U.S.C. 1350, it "does not distinguish among classes of defendants," *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989).[12]

The historical context supports the different textual treatment of ATS plaintiffs and defendants. As explained in *Sosa*, the ATS was passed by the First Congress in 1789, after the well-documented inability of the Continental Congress to provide redress for violations of treaties and the laws of nations for which the United States might be held accountable. See 542 U.S. at 715-717. The Continental Congress had "implored the States to vindicate rights under the law of nations," but only one State acted on that recommendation. *Id.* at 716. Notably, although that resolution "dealt primarily with criminal sanctions," William R. Casto, *The Federal*

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liability could raise distinct questions as to how a court should exercise its "residual common law discretion," *Sosa*, 542 U.S. at 738, that is a matter better addressed on remand.

[12] The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, would bar a suit against a foreign state, *Amerada Hess Shipping Corp.*, 488 U.S. at 436-438, and other immunities may apply in suits against other defendants, *e.g.*, *Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2292-2293 (2010).

*Courts' Protective Jurisdiction Over Torts Committed In Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 491 (1986) (Casto), the Continental Congress took the further step of recommending that the States also make available suits for damages, 21 *Journals of the Continental Congress 1774-1789*, at 1136-1137 (Gillard Hunt ed. 1912) (Continental Congress). And, indeed, the resolution provided that while it might at times be necessary "to repair out of the public treasury" to compensate for injuries caused by individuals, "the author of those injuries" should ultimately "compensate the damage out of his private fortune." Continental Congress 1136.

Events like the "so-called Marbois incident of May 1784"—"in which a French adventurer, De Longchamps, verbally and physically assaulted the Secretary of the French [Legation] in Philadelphia"—exposed the inability of the national government to redress law-of-nations violations. *Sosa*, 542 U.S. at 716-717; Casto 491-492 & n.138. A "reprise of the Marbois affair," *Sosa*, 542 U.S. at 717, occurred in 1787, during the Constitutional Convention, when a New York City constable entered the residence of a Dutch diplomat with a warrant for the arrest of one of his domestic servants. Casto 494. And, again, the "national government was powerless to act." *Ibid.*

From this history, the *Sosa* Court concluded that the First Congress intended the ATS to afford aliens a *federal* forum in which to obtain redress for the "relatively modest set of actions alleging violations of the law of nations" at the time. 542 U.S. at 720; see *id.* at 724 (noting importance of "private remedy"); see *Tel-Oren*, 726 F.2d at 782 (Edwards, J., concurring) (detailing evidence that the intent of the ATS "was to assure aliens

access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis"). Consistent with the recommendations of the Continental Congress, the First Congress both criminalized certain law-of-nations violations (piracy, violation of safe conducts, and infringements on the rights of ambassadors), see Act of Apr. 30, 1970, ch. 9, § 8, 1 Stat. 113-114 (1790 Act); *id.* § 28, 1 Stat. 118, and in the ATS provided jurisdiction over actions by aliens seeking civil remedies.

As the D.C. Circuit recently explained, there is no good "reason to conclude that the First Congress was supremely concerned with the risk that natural persons would cause the United States to be drawn into foreign entanglements, but was content to allow formal legal associations of individuals, i.e., corporations, to do so." *Doe*, 654 F.3d at 47. Given the apparent intent to provide compensation to the injured party through a civil damages remedy in a federal forum (rather than simply address the international affront through criminal prosecution or diplomatic channels), there is also no good reason to conclude that the First Congress would have wanted to allow the suit to proceed only against the potentially judgment-proof individual actor, and to bar recovery against the company on whose behalf he was acting. Take, for example, the 1787 incident involving the Dutch diplomat. If entry were made into his residence by the agent of a private process service company for the purpose of serving a summons on the diplomat, the international affront might equally call for vindication (and compensation) through a private suit against that company. Cf. 1790 Act, §§ 25-26, 1 Stat. 117-118 (providing that "any writ or process" that is "sued forth or prosecuted by any person" against an ambassador or

"domestic servant" of an ambassador shall be punished criminally and would constitute a violation of "the laws of nations").[13] And later, in opining on a boundary dispute over the diversion of waters from the Rio Grande, Attorney General Bonaparte stated that citizens of Mexico would have a right of action under the ATS against the "Irrigation Company." 26 Op. Att'y Gen. 250, 251 (1907).[14]

2. More generally, the proposition that corporations are "deemed persons" for "civil purposes," and can be held civilly liable, has long been recognized as "unquestionable." *United States* v. *Amedy*, 24 U.S. (11 Wheat.) 392, 412 (1826); see *Beaston* v. *Farmers' Bank of Del.*, 37 U.S. (12 Pet.) 102, 134 (1838). Corporations are capable of "suing and being sued." 1 Stewart Kyd, *A Treatise on the Law of Corporations* 13 (1793); see 1 William Blackstone, *Commentaries on the Laws of England* 463 (1765) (corporations may "sue or be sued * * * and do all other acts as natural persons may"); *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 125 (2003)

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[13] The incident discussed by Attorney General Bradford in his 1795 opinion, in which U.S. citizens had "taken part in the French plunder of a British slave colony in Sierra Leone," *Sosa*, 542 U.S. at 721, provides another useful analogue. See 1 Op. Att'y. Gen. 57, 59. The Attorney General there opined that, although the federal government could not criminally prosecute the Americans, there was "no doubt that the company or individuals" injured could sue under the ATS. *Ibid.* It seems unlikely that Congress would have intended federal courts to be categorically barred from considering a suit against a U.S. corporation on whose behalf the individuals acted.

[14] In cases of piracy, legal responsibility was not limited to natural persons. "The vessel which commit[ted] the aggression [wa]s treated as the offender," and was subject to forfeiture. *Harmony* v. *United States* (*The Malek Adhel*), 43 U.S. (2 How.) 210, 233 (1844).

(detailing "common understanding" that corporations have long had the "capacity to sue and be sued").[15]

As particularly relevant here, corporations were capable of being sued in tort. This Court has explained that, "[a]t a very early period, it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety." *Philadelphia, Wilmington, & Balt. R.R.* v. *Quigley*, 62 U.S. (21 How.) 202, 210-211 (1859); see *Chestnut Hill & Spring House Turnpike Co.* v. *Rutter*, 4 Serg. & Rawle 6, 17 (Pa. 1818) ("[F]rom the earliest times to the present, corporations have been held liable for torts."). In 1774, for example, Lord Mansfield's opinion for the Court of King's Bench held that a corporation could be held liable in damages for failing to repair a creek that its actions had rendered unnavigable. See *Mayor* v. *Turner*, (1774) 98 Eng. Rep. 980. Early American courts followed suit. See, *e.g.*, *Chestnut Hill*, 4 Serg. & Rawle at 17; *Gray* v. *Portland Bank*, 3 Mass. (2 Tyng) 363 (1807); *Riddle* v. *Proprieters of the Locks*, 7 Mass. (6 Tyng) 168 (1810); *Townsend* v. *Susquehanna Turnpike Co.*, 6 Johns. 90 (N.Y. Sup. Ct. 1809).

Holding corporations liable in tort for violations of the law of nations of the sort otherwise actionable in a federal common law action based on the ATS is thus consistent with the common law backdrop against which the ATS was enacted and subsequently amended. As even the Second Circuit recognized, this Nation's "legal

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[15] See also *Amedy*, 24 U.S. (11 Wheat.) at 412 (interpreting "person" in 1801 criminal statute to include corporations).

culture" has "long" grown "accustomed" to imposing tort liability on corporations. Pet. App. A8-A9; see *Doe*, 654 F.3d at 48 ("The general rule of substantive law is that corporations, like individuals, are liable for their torts.") (citation omitted); 9A William M. Fletcher, *Cyclopedia of the Law of Corporations* § 4521 (2008 rev. ed.) (discussing tort suits against corporations). And the *Sosa* Court's cautionary admonitions provide no reason to depart from the common law on this issue.[16]

3. International law does not counsel otherwise. As discussed (see Part II.A, *supra*), international law does not dictate a court's decision whether to recognize, and how to define, a federal common law cause of action to enforce a law-of-nations violation of the sort deemed

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[16] In *Mohamad* v. *Palestinian Authority*, No. 11-88 (oral argument scheduled for Feb. 28, 2012), the Court has granted certiorari to decide whether the TVPA permits actions against organizations as well as natural persons, and ordered the case to be heard in tandem with this case. If the Court concludes that acts of torture and extrajudicial killing can be brought under the TVPA only against natural persons, that would not support a categorical rejection of corporate liability under the ATS. The TVPA was enacted to furnish a clear statutory cause of action for torture and extrajudicial killing under color of law of a foreign nation, in light of uncertainty concerning application of the ATS as a result of Judge Bork's opinion in *Tel-Oren*, which disagreed with the Second Circuit's decision in *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (1980). See H.R. Rep. No. 367, 102d Cong., 1st Sess. Pt. 1, at 2-4 (1991); S. Rep. No. 249, 102d Cong., 1st Sess. 3-5 (1991); see also *Sosa*, 542 U.S. at 728, 731. The TVPA is distinct from the ATS in several respects. Most significantly, whereas the text of the ATS is silent as to the identity of the defendant, the TVPA confers a private right of action against an "individual." § 2(a), 106 Stat. 73. Moreover, whereas the TVPA itself provides a statutory cause of action only for certain acts under color of law of a "foreign nation," *ibid.*, the ATS was enacted to confer federal court jurisdiction and does not specify the law-of-nations violations that may be actionable.

potentially actionable under *Sosa*. But to the extent international law does speak to an issue, it should inform the court's exercise of its residual common law discretion. Here, nothing in international law counsels in favor of the Second Circuit's categorical bar to corporate liability.

The court of appeals relied heavily on its understanding that "no corporation has ever been subject to *any* form of liability under the customary international law of human rights." Pet. App. A16. But, even if correct, the court of appeals drew the wrong conclusion from that observation.

*First*, each international tribunal is specially negotiated, and limitations are placed on the jurisdiction of such tribunals that may be unrelated to the reach of substantive international law. See, *e.g.*, Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, art. 10 (Rome Statute) ("Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."). Thus, the fact that no international tribunal has been created for the purpose of holding corporations *civilly* liable for violations of international law does not contribute to the analysis, because the same is true for natural persons.[17] Cf. Pet. App. A141 ("If the absence of widespread agreement in the world as to civil liability bars imposing liability on corporations, it bars imposing liability on natural persons as well."); *Flomo*, 643 F.3d at 1019 ("If a plaintiff had to show that civil liability for such violations was itself a norm of international law, no claims under

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[17] Some international criminal tribunals authorize reparations to victims. See, *e.g.*, Rome Statute art. 75.

the [ATS] could ever be successful, even claims against individuals.").

*Second*, the reason why the jurisdiction of international *criminal* tribunals has thus far been limited to natural persons (see Pet. App. A51-A54) appears to be because of certain features unique to *criminal* punishment. That limitation is not indicative of a general prohibition against holding corporations (as compared to natural persons) accountable for violations of international law. See Pet. App. A165-A166 (Leval, J., concurring only in the judgment) ("[I]nternational tribunals withhold criminal liability from juridical entities for reasons that have nothing to do with whether they violated the conduct norms of international law."); *id.* at A119-A127. For example, the Rome Statute, which established the International Criminal Court (ICC), was based on the principle of complementarity. Rome Statute preamble ¶ 10. The ICC was to assume criminal jurisdiction only when national courts were unable (or unwilling) to genuinely investigate or prosecute certain international crimes. See Rome Statute art. 17. Because many foreign states do not criminally prosecute corporations under their domestic law for any offense, see Pet. App. A123-A124, extending the ICC's criminal jurisdiction to include corporations would have rendered complementarity unworkable. Notably, however, several countries (including the United Kingdom and the Netherlands) that have incorporated the Rome Statute's three crimes (genocide, crimes against humanity, and war crimes) into their domestic jurisprudence themselves impose criminal liability on corporations and other legal persons for such offenses. See Anita Ramasastry & Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability*

*for Grave Breaches of International Law—A Survey of Sixteen Countries—Executive Summary* 13-16, 30 (2006), http://www.fafo.no/pub/rapp/536/536.pdf.

With respect to Nuremberg in particular, while it is true that no private organization or corporation was criminally charged or convicted, it is equally true that nothing in the history of the Nuremberg proceedings suggests that juridical persons could never be held accountable (through criminal prosecution or otherwise) for violating international law. See Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in Criminal Law: What Nuremberg Really Said*, 109 Colum. L. Rev. 1094, 1239 (2009) (noting that corporate liability was "explored, and was never rejected as legally unsound," and that corporations were not prosecuted at Nuremberg "not because of any legal determination that it was impermissible under international law"); cf. Diarmuid Jeffreys, *Hell's Cartel* 405-406 (2008) (noting that German court in subsequent suit, apparently brought under German law, held that "[t]he fundamental principles of equality, justice, and humanity must have been known to all civilized persons, and the [I.G. Farben chemical company in its current liquidated form] cannot evade its responsibility any more than can an individual").[18]

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[18] The International Military Tribunal's statement that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced," see Pet. App. A12, A50 (quoting The Nuremberg Trial (*United States* v. *Goering*), 6 F.R.D. 69, 110 (Int'l Military Trib. at Nuremberg 1946)), has been taken out of context. The Tribunal clearly was rejecting the defendant's argument that only a state could be held liable for violations of international law; it was not making any distinction among actors other than the state.

*Third*, international tribunals are not the sole (or even the primary) means of enforcing international-law norms. Until the twentieth century, domestic law and domestic courts were the primary means of implementing customary international law. And holding corporations accountable if they violate the law of nations is consistent with international law. Today, a number of international agreements (including some that the United States has ratified) require states parties to impose liability on corporations for certain actions. See, *e.g.*, Convention Against Transnational Organized Crime, art. 10(1), Nov. 15, 2000, S. Treaty Doc. No. 16, 108th Cong., 2d Sess. (2004), 2225 U.N.T.S. 209; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 2, Dec. 17, 1997, S. Treaty Doc. No. 43, 105th Cong., 2d Sess. (1998), 37 I.L.M. 1 (1998); see also, *e.g.*, *Doe*, 654 F.3d at 48-49 & n.35. As the Chairman of the Rome Statute's Drafting Committee explained, "all positions now accept in some form or another the principle that a legal entity, private or public, can, through its policies or actions, transgress a norm for which the law, whether national or international, provides, at the very least damages * * * and other remedies such as seizure and forfeiture of assets." M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 379 (2d rev. ed. 1999).

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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